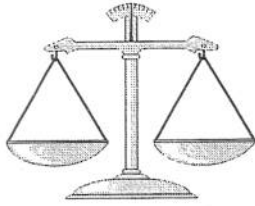


for The Defense



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The Training Newsletter for the Maricopa County Public Defender's Office ~ Dean Trebesch, Maricopa County Public Defender

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THE CONDEMNED SELF-DEFENSE RAJIs THAT REFUSE TO DIE: STATUTORY 4.04 AND 4.13

By Anna M. Unterberger
Deputy Public Defender, Appeals Division

Introduction

Your client isn't going to take the plea, or there isn't one. Once again, it's trial time! But if you're going to be arguing self-defense, there's something that you need to know: *some of the language in two of the self-defense RAJIs is wrong!!!*

This article reviews those two RAJIs¹ and the case law that condemned certain language in them. It begins with a review of the importance of jury instructions to your case in general. And as far as your client's appeal goes, jury instructions are one of the two areas that most-frequently produce winning issues on appeal.¹

Your Client Is Entitled to Accurate Jury Instructions

An accused has a due process and "fair trial" right to be tried before an accurately instructed jury. U.S. Const., Amends. V (due process clause), VI and XIV; Ariz. Const., Art. 2, §§ 4, 23 and 24. Jury instructions must be drafted so that they guarantee that the jurors understand the issues and are not misled. *Borel v. Fiberboard Paper Products Corp.*, 493 F.2d 1076, 1100 (5th Cir. 1973). Instructions that mislead the jurors on the rules of law are improper. *Evans v. Pickett*, 102 Ariz. 393, 397, 430 P.2d 413, 417 (1967). "Jury instructions are, in essence, a guide to the proper verdict." *Lay v. City of Mesa*, 168 Ariz. 552, 555, 815 P.2d 921, 924 (App. 1991). When drafting instructions, lawyers and judges must ask whether the language is clear enough so that a lay person would understand the legal concepts presented in the instructions, and be able to arrive at a verdict consistent with the law. *Evans* at 397, 430 P.2d at 417. Conflicting, inconsistent instructions are prejudicial. *Lunt v. Brady Manufacturing Corp.*, 13 Ariz. App. 305, 307, 475 P.2d 964, 966 (1970).

The "trial court has a duty to instruct the jurors on the law concerning the facts of the case and on matters vital to a proper consideration of the evidence." *State v. Settle*, 111 Ariz. 394, 396, 531 P.2d 151, 153 (1975). "It is the duty of the court to give the jury the rules of law to guide their deliberations and determinations, and these rules must not be at such cross purposes as to confuse or mislead the jury. If the instructions are contradictory upon the main point in question, how is the jury to know which to follow, or which is a correct statement of the law?" *Hurley v. State*, 22 Ariz. 211, 222, 196 P. 159, 163 (1921).

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Statutory 4.04 and *State v. Grannis*: When Apparent Deadly Force Justifies Defensive Deadly Force

Statutory 4.04 reads:

A defendant is justified in using or threatening physical force in self-defense if the following two conditions existed:

1. A reasonable person in the defendant's situation would have believed that physical force was immediately necessary to protect against another's use or attempted use of unlawful physical force; and
2. The defendant used or threatened no more physical force than would have appeared necessary to a reasonable person in the defendant's situation.

However, a person may use deadly physical force in self-defense only to protect against another's use or threatened use of deadly physical force.
(emphasis added)

"In *State v. Grannis*, our Supreme Court struck down the paragraph: 'A defendant may only use deadly physical force in self-defense to protect himself from another's use or attempted use of deadly physical force.'"

Self-defense justifies the use or threat of any physical force only while the apparent danger continues. The right to use or threaten any force in self-defense ends when the apparent danger ends.

The standard for determining whether a defendant is entitled to the defense of self-defense is whether a reasonable person, similarly situated, would believe that physical force was immediately necessary to protect against another's use or attempted use of unlawful physical force. That the defendant's belief was honest is immaterial. You must measure the defendant's belief against what a reasonable person would believe.

For almost a century, Arizona has recognized that the right to act in self-defense may be founded upon an apparent, though mistaken, belief that deadly force is necessary to protect against another's apparent use of force sufficient to cause death or serious bodily injury. *Wilson v. Territory*, 7 Ariz. 47, 51-52, 60 P. 697, 698 (1900). And in 1995, the Arizona Supreme Court made it crystal clear that a paragraph that was almost identical to the italicized paragraph in Statutory 4.04 was an incorrect statement of the law, and courts should not give it. In *State v. Grannis*,² our Supreme Court struck down the paragraph: "A defendant may only use deadly physical force in self-defense to protect himself from another's use or attempted use of deadly physical force." *Id.* at 61, 900 P.2d at 10. This paragraph appeared at the end of the instruction. The instruction also properly contained the paragraph: "Actual danger is not necessary to justify the threat or use of physical force in self-defense. It is enough if a reasonable person in the defendant's situation would have believed that he was in immediate physical danger." *Id.*

First, the Court recognized that, "[u]nder A.R.S. §§ 13-404 and -405, apparent deadly force can be met with deadly force, so long as defendant's belief as to apparent deadly force is a reasonable one. An instruction on self-defense is required when a defendant acts under a reasonable belief; actual danger is not required." *Id.* at 60, 900 P.2d at 9 (emphasis in the original); accord, *State v. Dumaine*, 162 Ariz. 392, 404, 783 P.2d 1184, 1196 (1989).

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Editor: Russ Born

Assistant Editors: Jim Haas
Lisa Kula
Frances Dairman

Office: 11 West Jefferson, Suite 5
Phoenix, Arizona 85003
(602) 506-8200

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Second, the Court adopted co-defendant Webster's argument that "the instruction incorrectly led the jury to believe that actual deadly force rather than reasonably apparent deadly force was necessary to justify deadly force in response" because the last, offending paragraph "could plausibly be interpreted as a limitation on the entire instruction." *Grannis* at 61, 900 P.2d at 10. Consequently, "the instruction suggested that reasonably apparent physical force could justify non-deadly physical force by the defendant, but that only actual deadly force could justify defendant's deadly force." *Id.* "Accordingly, we hold that the trial court's instruction regarding justification for deadly force constitutes error." *Id.*

And third, the Court highlighted the fact that co-defendant Webster "did not claim in his defense that the victim was actually armed or attempting to use deadly force against Webster or Grannis; instead, Webster claimed that he reasonably believed, even if incorrectly, that deadly force was necessary based on the victim's actions." *Id.* "The jury could not adequately consider this question without being properly instructed as to the correct standard set forth in § 13-405." *Id.*

Considering that *Grannis* was filed in July 1995, why do attorneys continue to ask for, and why do judges continue to give, the condemned Statutory 4.04 language? It seems that this result is the product of three factors:

- it's in the 1989 RAJIs;³
- the 1996 RAJIs didn't replace it with anything;⁴ and
- attorneys and judges haven't read, or have read and forgotten about, *Grannis*.

As defense counsel, please make sure to exclude the *Grannis* language from Statutory 4.04. In light of the appellate records that I've reviewed during the past three years, the judge isn't going to do it for you! A sample replacement instruction for RAJI 4.04 appears at the end of this article.

NOTE: Although the defense at issue in *Grannis* was self-defense, the Court also reviewed the language of A.R.S. § 13-406, our defense-of-third-persons statute. The corresponding RAJI, Statutory 4.06, contains the same language that *Grannis* condemned.

Statutory 4.13, *State V. Hunter* and *State V. Duarte*: Don't Shift the Burden Away from the State

Statutory 4.13 reads:

If you find that the defendant has presented evidence sufficient to raise the issue of justification with respect to the crime of _____, the State must then prove beyond a reasonable doubt that the defendant did not act in self-defense.

If you decide that the defendant's conduct was justified, you must find the defendant not guilty of the crime of _____. (emphasis added).

A defendant is entitled to a justification instruction "whenever there is the slightest evidence of

justification for the defensive act." *State v. Plew*, 150 Ariz. 75, 77, 722 P.2d 243, 245 (1986), quoting from *State v. Bojorquez*, 138 Ariz. 495, 497, 675 P.2d 1314, 1316 (1984).

"The 'slightest evidence' is that evidence 'tending to prove a hostile demonstration, which may be reasonably regarded as placing the accused apparently

in imminent danger of losing [his] life or sustaining great bodily harm. . . ." *Plew* at 77, 722 P.2d at 245, quoting from *State v. Wallace*, 83 Ariz. 220, 223, 319 P.2d 529, 531 (1957); see also, *State v. Duarte*, 165 Ariz. 230, 231, 798 P.2d 368, 369 (1990) (justification instruction should be given where evidence, even if circumstantial, in the slightest degree tends to indicate that the allegedly criminal act was justified). The defendant's own testimony may raise the necessary inference, even in the face of conflicting testimony. *Plew* at 77, 722 P.2d at 245.⁵

"It is vital that the jury not misunderstand the concept of the defendant's burden of proof on self-defense; the jury must be instructed with great care to prevent the misunderstanding of this concept." *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984),⁶ quoting from *State v. Denny*, 119 Ariz. 131, 134, 579 P.2d 1101, 1104 (1977). In *Hunter*, our Supreme Court disapproved of language identical to the second paragraph in Statutory 4.13 because it resulted in burden-shifting. "The instructions did not make it clear that appellant's burden as to self-defense was limited to raising a reasonable doubt and that the burden on the state was then to disprove beyond a reasonable doubt that appellant acted in self-defense." *Id.* at 90, 688 P.2d at 982.

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Our Supreme Court continued to disapprove of this paragraph in *Duarte*: “[W]e continue to find objectionable the language disapproved in *Hunter* and still contained in RAJI 4.13, that ‘if you decide the defendant’s conduct was justified, you must find the defendant not guilty,’ and we caution trial courts against continuing to use this phrasing to instruct juries.” *Duarte* at 232, 798 P.2d at 370. Instead, the instruction that should be given reads:

If evidence was presented that raises the issue of self-defense [or some other justification], then the state has the burden of proving beyond a reasonable doubt that the defendant did not act in self-defense.

If the state fails to carry this burden, then you must find the defendant not guilty of the charge.

Id. (emphasis added). *Accord*, *State v. Dorman*, 167 Ariz. 153, 154 n.1, 805 P.2d 386, 387 n.1 (1991). “This language reflects the original purpose of the instruction -- to inform the jury that acquittal is *mandatory* if the state fails to disprove beyond a reasonable doubt a properly raised issue of self-defense.” *Duarte* at 232, 798 P.2d at 370 (emphasis in the original). Our Supreme Court has “explicitly recommended” the *Duarte* instruction to the trial courts. *Dorman* at 154, 805 P.2d at 387.

Despite this explicit recommendation, attorneys continue to ask for, and courts continue to give, the second paragraph of Statutory 4.13. Why? Again, it’s probably because: (1) it’s in the 1989 RAJIs; (2) the 1996 RAJIs didn’t replace it with anything; and (3) attorneys and judges haven’t read, or have read and forgotten about, the controlling case law.

Conclusion

Despite condemnation by the Arizona Supreme Court, certain language in RAJI Statutory 4.04 and 4.13 refuses to die. Please don’t prolong the life of that language. In your self-defense (or defense-of-third-persons) cases, you should play the Grim Reaper and educate the court about this situation. It could make the difference between “guilty” and “not guilty”!!! ■

SAMPLE INSTRUCTIONS

Justification for Self-defense

A defendant is justified in using or threatening physical force in self-defense if the following two conditions existed:

1. A reasonable person in the defendant’s situation would have believed that physical force was immediately necessary to protect against another’s apparent use or apparent attempted use of unlawful physical force; *and*
2. The defendant used or threatened no more physical force than would have appeared necessary to a reasonable person in the defendant’s situation.

A person may use deadly physical force in self-defense only to protect against another’s apparent use or apparent threatened use of deadly physical force.

Self-defense justifies the use or threat of physical force or deadly physical force only while the apparent danger continues. The right to use physical force or deadly physical force in self-defense ends when the apparent danger ends.

Actual danger is not necessary to justify the use of physical force or deadly physical force in self-defense. Justification exists if a reasonable person in the defendant’s situation would have believed that immediate physical danger appeared to be present. The force used may not be greater than necessary to repel the apparent danger.

The standard for determining whether a defendant is entitled to the defense of self-defense is whether a reasonable person, similarly situated, would believe that physical force or deadly physical force was immediately necessary to protect against another’s apparent use or apparent attempted use of unlawful physical force. That the defendant’s belief was honest is immaterial. You must measure the defendant’s belief against what a reasonable person in the defendant’s situation would believe.

AUTHORITY: RAJI 4.04 (modified); *State v. Grammis*, 183 Ariz. 52, 900 P.2d 1 (1995). ■

1. The other area is jury selection.
2. 183 Ariz. 52, 900 P.2d 1 (1995).
3. Maybe it's time to start issuing replacement supplements for the RAJIs that are similar to the supplements that are issued for the Arizona Revised Statutes and most legal treatises.
4. The 1996 RAJIs didn't revise *any* Statutory RAJIs. Instead, they addressed only the "Standard" RAJIs, which are the more general instructions that appear at the beginning of the RAJI book.
5. Make sure to check the date of the charged offenses in your client's case. Effective July 21, 1997, A.R.S. § 13-205(A) states that the defendant's burden of proof for justification is preponderance of the evidence. See, 1997 Ariz. Sess. Laws, Ch. 136, § 4.
6. MCDPD James Rummage briefed this case.

OPPORTUNITY KNOCKS FOR THE DUI OFFENDER: DUI COURT

By Russell Born
Training Director

Maricopa County has recently initiated a new program which is geared toward breaking the cycle of the repeat DUI offender. If it proves effective, you can be sure that it will be adopted by virtually every county in the state. Currently it applies only to DUI offenders who come into the system through Superior Court. This will usually mean that most of the people who are in the program are felony offenders. But let's face it, felony offenders usually have an alcohol problem with which they need help. Hopefully, this is where the DUI Court can make an impact.

Funding

The DUI Court is funded through a special grant from the National Highway Safety Administration. The grant provides funding for several different positions, including several probation officers, a public defender, and limited funding for different court personal. The funding will last until September 1999, which should give the program sufficient time to prove its effectiveness. After the eighteen months have passed, the program will be evaluated by the Mid-America Research Institute. Mid-America has been involved in other programs targeting the repeat offender, trying to change the offenders' behavior with the goal of decreasing the possibility of re-offending.

Model

The model for the DUI Court came from the Drug Courts which have shown considerable promise in crime reduction. The objective of DUI Court is to reduce drinking and driving behavior in defendants with a history of DUI related incidents. Unlike Drug Courts, however, there is no pre-filing diversion. Everyone who comes into DUI Court will have already been sentenced to probation by a superior court judge.

How It Works

Once a defendant is found guilty, or pleads guilty, he or she is sent to the probation department for a pre-sentence investigation. Defendants at the pre-sentence level are randomly placed by a probation officer in either the control or experimental group. At sentencing, a defendant will know whether or not they are going into the DUI Court. Defendants who are facing DOC time (four months, etc.) will still have to complete that part of the sentence before participating in the program. DUI court does not affect the mandatory DOC requirements. The real benefits to the client come afterwards, when they begin their probation.

Participants in DUI Court will be required to meet with the DUI Court judge once a month. In this case, it will be Judge Cole of the Maricopa County Superior Court. The participant will enter into a contract with Judge Cole which will spell out the expectations of the Court and the Probation Department. These expectations will include AA meetings, substance abuse treatment, sobriety, reporting to the Probation Department, etc. At the participant's next meeting with the judge, they will either 1) be promoted to the next phase and given a new contract, 2) be made to repeat the last phase, or 3) depending on how long the person has been in the program, be discharged from the program based on their fulfillment of the contract.

"One of the hallmarks of the DUI program is the close supervision of the probationer during the first year of probation."

One of the hallmarks of the DUI program is the close supervision of the probationer during the first year of probation. Every month they will have to report to the judge, visit with the probation officer and receive a visit from a surveillance officer. The surveillance officer will visit the probationers at their homes or jobs to check whether or not they have been drinking. If the probationer is not complying with probation, they will be pulled back into court.

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When a probationer is placed on DUI Court probation, they automatically receive a sixty day deferred jail sentence as a condition of probation. This is above and beyond any mandated term of incarceration they serve, e.g. four months in the Department of Corrections. These deferred days in jail can be used by the judge to help ensure the participant's compliance with the contracts. A few days in jail is sometimes all that is needed to get the probationer back on the right track.

Benefits to Our Clients

There are substantial benefits that our clients can reap from the program if they take it seriously. The first and most important is the benefit of a future devoid of the certainty of re-offending. The second benefit is the shortened probationary period. According to probation officer Jodi Fisher, a probationer may be able to successfully complete the first phase of DUI Court probation in as little as one year. This of course, is contingent upon the participant's progress and continued compliance with the probation mandates.

Once the probationer makes it through the first phase of DUI Court, they graduate to the next level. Here they will be placed on a "record only" (minimum supervision) probation for one year. Participants will not have to begin paying probation service fees or fines until being placed on "record only" supervision. Conceivably a probationer could be finished with probation in a little over two years. That is quite a difference from the normal four, five, or eight years that some DUI offenders must do. This limited period of supervision, together with the financial incentives, should be strong motivating factors for offenders to complete the DUI Court program.

As Jodi Fisher so aptly concluded, "It is hoped that regular contact with the Judge, the ready availability of substance abuse treatment, and immediate rewards and consequences for participants, will have an overall positive effect on offenders, their families, and the community."

If you need more information about the program please call Adult Probation Officer Jodi Fisher (# 602-506-7237), or Public Defender Nancy Hines (#602-506-8363). ■

NO NEED TO ADD TO VICTIMS' CONSIDERABLE RIGHTS

By Stephen Tuttle
Political Consultant

Editor's Note: The debate over the proposed 28th Amendment to the U.S. Constitution, Victims' Rights, is heating up. In an effort to inform and help us understand the issues, we agreed to print the following article which earlier appeared in the Arizona Republic. (Reprinted with permission.)

It must be a good idea, because very nearly everybody seems to be supporting it. The Victims' Rights Amendment was introduced by our own Senator Jon Kyl, a tough-on-crime Republican, and California's Senator Dianne Feinstein, a tough-on-crime Democrat. It has attracted significant bipartisan support from the top down: President Clinton and Attorney General Janet Reno are supporters, and so is Senate Majority Leader Trent Lott. Nationally known college professors write flamboyantly supportive tracts, and newspapers across the nation, including this one, rhapsodize eloquently about how badly we need this.

The proposed 28th Amendment to the U.S. Constitution guarantees a host of rights to crime victims, most of which seem innocent enough on the surface and most of which are already state law, at least in Arizona. There is one tiny flaw: It is based on a lie.

Politicians have perpetuated many myths with their endless please-elect-me rhetoric, but none is more preposterous than the notion that our criminal justice system is somehow tilted in favor of the defendant. Sen. Kyl claims, at least according to the *Republic*, that this amendment will bring balance to that system, ending the practice of giving special rights to defendants when victims have none.

The imbalance that exists in the criminal justice system is tilted in exactly the opposite direction. The victim is represented by a prosecution that also represents everybody else in the county, state or entire country against what is usually a lone defendant. That's all the power of the government and all the power it can bring to bear against an individual, as in *The United States of America vs. J. Fife Symington, III*. The police who initially investigate and make the arrest, work for the

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victim. Additional investigators and the best taxpayer-paid and private crime labs work for the victim. The entire team of professional lawyers employed by the prosecution, which gets as many as are needed, works for the victim. Counselors and a growing array of other "advocates" work for the victim. All paid for by the government for the benefit of the victim and the rest of us.

A defendant, on the other hand, may hire his or her own defense team. But most can't afford that route and will end up with a public defender, usually an overworked, underpaid civil servant with a huge caseload and the need to plea bargain. A defendant will be one of dozens of clients - often many dozens- the public defender is representing at any one time. If the defendant wants investigators or forensic work beyond that being done by his opponent, the court's permission and approval is required. Most defendants will find themselves seriously outgunned, outspent and at an enormous disadvantage in a system which, far from being imbalanced in their favor, is weighted to obtain their conviction at virtually every step along the process. Even wealthy defendants are at some disadvantage, at least financially. Both O.J. Simpson, who won anyway, and former Gov. Symington, who did not, were dramatically outspent by the government.

If the much-cliched "playing field" is tilted in the favor of defendants and away from the victim, it would stand to reason that defendants are flying out of courtrooms as acquitted citizens all over the countryside. But the opposite is true. Conviction rates have always been high, now running better than 75 percent nationally. In Maricopa County, where County Attorney Rick Romley runs an especially aggressive shop, the rate is even higher, a lofty 86.3 percent in 1996, the most recent year for which records are complete. Most of us applaud that kind of track record, but defendants would be stunned to hear they were the beneficiaries of special rights.

In fact, defendants have exactly the same rights as everyone else protected by the Constitution. Those rights often are invoked by those accused of crimes because the power of the government prosecuting is so overwhelming that no individual could prevail without those protections. That accused criminals have too many rights, at the expense of the victim, is a popular abstract idea that quickly vanishes inside the reality of the criminal justice system. Just ask Mr. Symington.

Most states, including Arizona, already have significant legal protections for crime victims and to the extent we can better provide economic and emotional

support, we should. But crime victims have never been victimized by a constitutional flaw or weakness but by an insensitive group of individuals within the system that the Constitution spawned. The most important improvements have been societal, not legal. Communities have been successfully upgrading their treatment of victims for more than a decade. Those problems not yet solved require fresh attitudes and improved sensitivity, not a constitutional amendment that tilts the balance of our justice system even further away from defendants.

The real problem here is that politicians, despite continuing good news of dropping crime rates, still generate votes by riding the victims' rights bandwagon. They seem intent on creating a system based, at least in part, on the most vengeful instincts of our most deeply wounded citizens. The statue that symbolizes justice is wearing a blindfold for a reason: Allowing one group of citizens to pull it down won't strengthen a Constitution that has already been battered in the name of the war on crime. ■

SPECIAL ACTION FILING PROCEDURES

By Lucia Herrera
Lead Secretary - Appeals

So, you need to file a Petition for Special Action, but you're not quite sure on the format or filing procedures. I hope this information will help answer some of your questions.

When filing a Petition for Special Action, and you intend to have us in the Appeals' Division file this Petition for you, we ask that you inform us of this Petition first thing in the morning. When we are informed of a Petition for Special Action, schedules must be adjusted to insure timely filing of the Petition and for processing at the Court of Appeals. The processing time for filing Petitions takes between 30 and 45 minutes. Actually, the Court prefers that all Petitions for Special Action be filed at 9:00 a.m. If a Petition for Special Action is taken to the Court of Appeals at 4:30 p.m., the Court will accept and date-stamp your Petition; however, your Petition will not be processed at that time. You will be informed to return the following day to pick up any conformed copies and Orders.

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Format Information

The caption should identify the Petitioner, Respondent Judge, and the Real Party in Interest. As of January 1, 1998, amendments to Rule 7, Rules of Procedure for Special Actions, went into effect. More specifically, these amendments involve the Form and Length for filing Petitions for Special Actions, and states: "Petitions and Responses shall not exceed 10,500 words, if in proportionately-spaced typeface, *or* shall not exceed 30 pages if in monospace typeface, exclusive of the appendix." [Proportionately-spaced typefaces include any font that is scalable; monospace typeface is Courier10.] "A Reply, if any, shall not exceed 5,250 words if in proportionately spaced typeface, or 15 pages if in monospace typeface."

Appendix

A copy of the decision (minute entry) from which the Petition is being taken should be attached to the Petition. All references to the record should be supported by an Appendix of documents. If this Appendix exceeds 15 pages, it shall be fastened together separately from the Petition or Response.

Certificate of Compliance

The Petition, Response, and Reply must be accompanied by a Certificate of Compliance that states the line spacing, and states whether the petition uses a proportionately spaced typeface or monospaced typeface. When using a proportionately-spaced typeface, the Certificate of Compliance should include the typeface, point size, and word count. The attorney or secretary preparing this Certificate may rely on the word count of the processing system used to prepare this Petition. When using a monospace typeface, the Certificate of Compliance should include the typeface and the number of characters per inch.

Copies

The original and seven (7) copies are filed with the Court of Appeals--the original and six (6) copies for the court, and one (1) copy is returned to the attorney. The attorney's secretary should make copies and distribute to all interested parties. Some attorneys prefer to file their Petitions with colored cover sheets; *this is not required by the Court*, but they will accept them.

Filing

The Clerk of the Court of Appeals will assign a number to your Petition. As mentioned, the processing time is usually 30 to 45 minutes. The Clerk will then issue an Order. This Order will have a filing schedule and will list the panel of judges assigned to your Petition. This Order is returned to the attorney, and copies are mailed or served to all interested parties.

Certificate of Mailing/Affidavit of Service

A Certificate of Mailing or Affidavit of Service is prepared by the attorney and is filed with the Court of Appeals to show compliance with the Order given to you at the time you filed your Petition. This Certificate or Affidavit is filed the same day or the following day before 9:00 a.m.

Request for Stay

A Request for Stay is filed in Superior Court, not the Court of Appeals. If a Request for Stay was filed in Superior Court and denied, and if you then file this Request with the Court of Appeals, attach the minute entry from Superior Court denying your Request. *Please note* that the Court of Appeals prefers that the attorney be present when filing this Request as it makes it easier for the Court to have the attorney speak with an appellate judge who will review the Request for Stay at the time of filing.

Oral Argument

If an Oral Argument is requested, the Court of Appeals will issue an Order either denying or granting this Oral Argument after a Response to the Special Action is filed, or after the time to file a Response has elapsed.

The staff at the Court of Appeals is very helpful; however, they will refuse Petitions that do not conform to the rules. *Believe me, it has happened!* If you have any other questions, feel free to contact anyone in the Clerk's Office at the Court of Appeals. Their number is 542-4821. Please see attached amendment on page 14. ■



ARIZONA ADVANCE REPORTS

By Steve Collins
Deputy Public Defender - Appeals

State v. Young, 263 Ariz. Adv. Rep. 14 (CA 1, 2/19/98)

The defendant was convicted for knowingly possessing a prohibited weapon, a sawed-off shotgun. A.R.S. § 13-3101(4) provides a firearm that is now in a permanently inoperable condition does not constitute a "firearm" for the purpose of the prohibited weapon statute.

By spending over one hour installing a new firing pin and other alterations, a firearms expert was able to make the shotgun operable. Therefore, the Court of Appeals held the jury properly found the firearm was not permanently inoperable.

The prosecutor was not required to prove the defendant knew the weapon was not permanently inoperable. "Operability of the weapon is not an element of the offense of knowingly possessing a prohibited weapon; rather, permanent inoperability is an affirmative defense."

To prove the defendant's culpable mental state, the State was obliged to prove the defendant knew he possessed a sawed-off or short-barreled shotgun. It was not obliged to prove that he knew the specific barrel or overall length that made it a statutorily prohibited weapon. The Court of Appeals held this did not make it a strict liability offense.

During trial, a police officer testified he investigated the case while he was a member of the State Gang Task Force. This testimony was improper, but was harmless error, because of the curative instruction given to the jury.

State v. Bentlage, 263 Ariz. Adv. Rep. 30 (CA 2, 2/23/98)

The defendant was stopped for traffic violations. The owner of the vehicle, who was a passenger, gave consent for the police officer to search the vehicle. The appellate court held that this consent did not extend to a "zippered case" underneath the driver's seat which belonged to Defendant.

State v. Tankersley, 264 Ariz. Adv. Rep. 41 (SC, 3/12/98)

Polymearse chain reaction (PCR) and DQ-Alpha testing for DNA are now admissible. Arizona still uses the Frye Test in determining the admissibility of scientific evidence, but does not require unanimity among scientists.

The defendant wanted to introduce evidence showing a third party could have committed the strangulation murder which involved sexual assault. The third party had lived near the victim; had been linked to the strangulation murder of his wife; and had a prior sexual assault conviction. It was held this evidence was inadmissible because the third party's ten-year-old sexual assault conviction was too remote in time and dissimilar to the instant crime.

The fact that the State was one day late in filing its intent to seek the death penalty did not deprive the trial court of jurisdiction to impose death.

State v. Vasko, 264 Ariz. Adv. Rep. 34 (CA 1, 3/10/98)

The defendant's trial date was continued past the last day allowed under the speedy trial rights of Arizona Criminal Procedure Rule 8. It was improper for the trial court to exclude eight days in which the case rode the case-transfer calendar. The Court of Appeals found, "the trial court could not permissibly exclude these additional eight days as 'necessitated by congestion of the trial calendar' without first applying to the Supreme Court for a suspension of the rules in accordance with the requirements of Rule 8.4(c)."

The Court of Appeals held because there was no showing of prejudice, this issue may not be raised on direct appeal. Although acknowledging the Arizona Supreme Court has held to the contrary, the Court of Appeals states a speedy trial violation must be raised in a special action, unless there is actual prejudice.

The dissenting judge found because Rule 8 was violated, the case should be dismissed. This judge also found time should not have been excluded because a witness (police officer) was gone on three weeks of Army Reserve training.

State v. Eagle, 265 Ariz. Adv. Rep. 28 (CA 1, 3/26/98)

The Court of Appeals upheld the prosecutor's use of a peremptory jury strike on a Hispanic male because he "appeared young" and was "extremely nervous." It was held the "objective verification requirement" of *State v. Cruz* no longer applies.

(cont. on pg. 10)

The State lost or destroyed a handwritten police report. It was held that the "Willits instruction" did not have to state the jury "should assume" the evidence was unfavorable to the State. It was sufficient to merely state the jury "may draw an inference" unfavorable to the State.

Sexual assault was held not to be an element of kidnapping. Therefore, consecutive sentences for each crime did not violate the double jeopardy clause nor the double punishment provision of A.R.S. § 13-116.

State v. Flournoy, 265 Ariz. Adv. Rep. 41 (CA 1, 3/26/98)

The defendant waived a jury trial in Municipal Court and was convicted of DUI. He was entitled to a trial de novo on appeal to Superior Court. His previous waiver of a jury did not waive his right to a jury trial in Superior Court. ■

SELECTED 9TH CIRCUIT OPINIONS

By Louise Stark
Deputy Public Defender - Appeals

Ramirez v. Hatcher, 136 F.3d 1209 (9th Cir. 1998)

Challenge to Nevada's definition of "reasonable doubt." The definition was previously held to comport with due process, but defendant urges reversal based on two later U.S. Supreme Court cases. The test for constitutionality of this instruction is whether there is a reasonable likelihood that the jury interpreted it to allow conviction on an impermissibly lowered standard. The instruction first reiterated the presumption of innocence, and the State's burden of proving every "material" element of each crime charged beyond a reasonable doubt. It continued:

A reasonable doubt is one based on reason. It is not mere possible doubt but is *such a doubt as would govern or control a person in the more weighty affairs of life*. If the ...jurors, after ...comparison and consideration of all the evidence...can say they feel an abiding conviction of the truth of the charge, there is not a reasonable doubt. Doubt to be reasonable must be *actual and substantial*, not mere possibility or speculation. If you have a reasonable doubt...he is entitled to a verdict of not guilty.

The defendant raised the emphasized language as error. This Court rejects arguments that this language was previously disapproved, and lowered the burden of proof.

Because "actual and substantial" is contrasted with "mere possibility or speculation" this Court found no danger that the language increased the amount of doubt required before acquittal, and no reasonable likelihood the jury therefore lowered the state's burden of proof. Other cases held an instruction with "substantial" doubt to be fatally flawed where the instruction also equated it with "moral certainty" and "grave uncertainty" unlike the instruction here.

Because the burden of proof was otherwise correctly explained, there was no error in the "govern or control...in the more weighty affairs of life" language, although similar language has been disapproved. This Court specifically cites *Victor v. Nebraska*, 511 U.S. 1 (1994) as approving of the "abiding conviction of the truth of the charge" language. Again, the Court notes that even if a jury *could* have read the instruction to lower the state's burden, precedent dictated a finding of no *reasonable likelihood* of such an interpretation. Talk about splitting hairs.

Eslaminia v. White, 136 F.3d 1234 (9th Cir. 1998)

A tape recorded interview of the defendant was properly taken into the jury room for use in deliberations. After conviction the defense discovered that the other side of the tape contained a recorded interview with defendant's brother, commenting on facts, and particular people who were defense witnesses at trial. The brother did not testify, and his statements were never admitted, but the jury listened to both sides of the tape. The comments tended to bolster the state's version of the facts, helped the credibility of a state's witness, and reflected disparagingly on defense witnesses' credibility, and on the defendant's truthfulness.

This consideration of extrinsic evidence deprived the defendant of the chance to cross examine, confront witnesses, and have assistance of counsel. The error was of constitutional dimension, but trial error rather than structural error. The error would be harmless unless it had substantial and injurious effect or influence in determining the jury's verdict. Despite the somewhat cumulative nature of the extrinsic material improperly heard by the jury, the error resulted in reversal of the convictions.

(cont. on pg. 11) ☞

United States v. Albers, 1998 WL 122389 (Amended opinion) (9th Cir. 1998)

The Government appeals the suppression of evidence seized from a houseboat on Lake Powell. The trial court suppressed the items because, after seizing videotapes and film without a warrant, officers did not view them for several days. This court rules that where there is probable cause to seize videotapes and film, they need not be viewed at the scene of the search.

This court also determines that a houseboat is similar to a motor home for Fourth Amendment purposes. The houseboat could be searched without a warrant, upon probable cause if:

1. it was obviously readily mobile by the turn of a key, if not actually moving; and
2. there was a reduced expectation of privacy stemming from its use as a licensed vehicle subject to a range of police regulation inapplicable to a fixed dwelling.

Also, there was probable cause to search for evidence of the crime (prohibited jumping from cliffs into the water) where the houseboat was seen in a known jumping area, on a day when there were reports of jumping, damp equipment for the activity was in plain view on the deck, the boat's occupants seemed nervous, and *refused to answer questions*. (emphasis added)

United States v. Ani, 1998 WL 63551 (9th Cir. 1998)

Government appeals trial court suppression of evidence, and wins. Appellant accepted an express mail package containing heroin, sent to him under an alias at a rented commercial mail box. The heroin was hidden in the covers of a book, and the package was roughly the book's dimensions. Federal statutes control international mail searches. Interpretation of these statutes has yielded the analysis that to open and examine the contents of a certain type of package, Customs needs reasonable cause to suspect the presence of merchandise or contraband. This court assumes that the lower court was correct in finding that the inspection was a violation of federal law.

But, it reverses the trial court's suppression of the heroin. Although there is an expectation of privacy to some degree, international mail searches are like border searches. They require neither probable cause nor a warrant. A search is reasonable by virtue of it occurring at a border. The 4th Amendment does not apply to routine border searches, nor this search, so the

exclusionary rule and suppression are not valid remedies in this case. There is no constitutional right at stake that justifies the use of the exclusionary rule.

Mach v. Stewart, 137 F.3d 630 (9th Cir. 1998)

Jury selection on a charge of sexual conduct with a minor, in Arizona. In front of the whole panel, a prospective juror revealed that it would be hard to be impartial, because she was a CPS social worker, and had never had a client whose claim of sexual assault was not confirmed. She had taken child psychology courses and worked with mental health professionals. She repeated three more times that in three years she was not aware of a case in which a child lied about being sexually molested. The trial judge explained that trials are to determine whether a person is guilty, etc. The CPS worker said she "probably" could be fair and impartial. A motion to strike for cause, and a motion for mistrial, due to tainting the panel, were both denied. This court reverses the convictions due to error in impaneling a biased or tainted jury. Whether this reached the level of structural error was not decided, as it was not harmless.

Territory of Guam v. Voloria, 1998 WL 57498 (9th Cir. 1998)

Defendant was convicted of sexual conduct with a minor. His girlfriend testified that the defendant was the only one with access and opportunity who could have committed the crime against her 3 year old daughter. The physical and medical evidence was strong that a sexual assault had occurred. There had been arguments between the adults, providing bias, or motive for the girlfriend making up the claim. The defendant testified in his own defense, and presented other witnesses in a semi-alibi, good character defense, and to rebut certain facts stated by the girlfriend. Credibility of the two ex-lovers was critical. The record is incomplete as to what record or objection was made before trial, but there was some attempt by the defense to determine why the government was calling the officer who came to arrest the defendant. That officer testified that he went to defendant's home, advised defendant of the accusation, and requested that defendant accompany him to the police station. At the station, the officer testified, the defendant was advised of his constitutional rights and "[h]e chose not to waive his rights and requested for legal counsel" after which questioning stopped, and he was arrested.

There was no objection or motion to strike. But it was plain error, and resulted in reversal. The comment on silence and request for counsel was only one statement, but the Court factored in that there was no relevant topic in the officer's testimony, and the jury was never told to disregard it, and was even instructed on considering

(cont. on pg. 12)

testimony of law enforcement witnesses, of which this was the only one. Because the evidence boiled down to a credibility contest, the comment on post-arrest silence was prejudicial enough to affect the outcome.

***United States v. Moore*, 1998 WL 81287 (9th Cir. 1998)**

Moore was lured by an Internet ad to correspond with an undercover agent posing as a single mother looking for an adult male to teach her three young children about sex. After four months of e-mail, appellant drove across state lines to meet the family and begin this education.

He was arrested upon arrival at the meeting place, and charged with interstate travel w/ intent to engage in a sexual act w/ a juvenile. The statute defining this crime included a prohibition of "any sexual act (as defined in section 2245)." Section 2245 described only "conduct that results in the death of a person." After Moore's arrest, the statute was corrected to cite the originally intended definition statute. Because the statute under which he was convicted at the time required intent to engage in sexual acts resulting in death, and he had no such intent, his guilty plea and conviction were reversed. The conduct for which he was convicted, traveling w/ intent to engage in sexual conduct but not to result in death, was not prohibited by the language of the particular statute under which he was convicted.

***Williams v. Borg*, 1998 WL 125147 (9th Cir. 1998)**

Williams was charged with grabbing the victim in a parking lot, forcing her into her car, and driving off while demanding money. When he was unhappy with the amount on hand, she offered to go to an ATM, but the machine was closed. Williams then parked, forced her to perform fellatio, moved the car and forced her to perform fellatio again. He then drove back to the abduction site and left the victim in her car, taking her ATM card. He was convicted of kidnaping to commit robbery and two counts of oral copulation by means of force. The oral copulation counts included language that the defendant kidnaped the victim for the purpose of committing forcible oral copulation. It isn't clear whether this was a special finding by the jury separate from guilt, or whether it was part of the elements describing the crime charged. In any event, the fact of there being a kidnaping for that purpose increased the punishment. Williams argues that this is double jeopardy, as he committed only one kidnaping. There is no double jeopardy, as he was only convicted of one kidnaping; the finding(s) that he kidnaped the victim for purposes of two acts of oral copulation are merely provisions that increase the sentence. Multiple convictions and punishment from the same act do not violate double

jeopardy where each offense requires "proof of a fact which the other does not."

The defendant chose to testify at his trial, despite being advised that the state would impeach him with seven prior convictions. On cross examination the defendant refused to answer questions about the priors because it "may incriminate me in the case at hand." He was given several chances to change his position that first day, and again the next morning. The court explained that his testimony would be stricken, but if he answered, the jury could consider his testimony. He still refused. On appeal Williams argues that the priors were merely a collateral matter, and the sanction of striking all his testimony was arbitrary and disproportionate, depriving him of his right to testify in his own defense. An accused may not testify without subjecting himself to cross examination; the sanction was not arbitrary or disproportionate; the priors were relevant to allowing the jury to weigh two incompatible stories told by the victim and defendant. The opinion notes that some collateral matters are of importance to issues in dispute at trial.

Although finding no prosecutorial misconduct, comments suggesting that defense counsel used a "despicable and cheap tactic...a cheap trick" to get his client off were disapproved in general. The appellant's objection to being called "stupid" by the prosecutor four times was ignored by the court since "stupidity is among the least negative characteristics that might be attributed to Williams."

BULLETIN BOARD

Attorney Moves/Changes

John Brisson, Defender Attorney with Group D, left the office on April 24. John will be entering private practice. He started in the office as a participant in the student extern program in 1992.

Pauline (Polly) Houle, Defender Attorney - Juvenile, has been selected to succeed **Karen Santoro Caraway** as the new Durango Office Juvenile Supervisor, effective May 6. Before going to Juvenile about a year ago, Polly served with the trial division. Karen is rotating out of this assignment, after 7 years of extraordinary service to the office, and will remain at Durango.

Eric Devany, Defender Attorney with Group C, left the office effective April 24.

(cont. on pg. 13) ☞

Marc Kamin, a Group B Defender Attorney, left the office April 1.

Michelle Lue Sang will be leaving us on May 15 to become a Mesa City Court Judge. Michelle has had a distinguished career at our office, serving for four years as the supervisor of our Southeast Juvenile office and directing our new Dependency Division operations for the past year. She is an excellent choice for her new judicial role, and will be dearly missed by everyone at our office.

Suzette Pintard has been named to succeed Michelle as our Dependency Division Chief, effective May 18. Suzette has been working in that division since its inception almost a year ago, and served in our juvenile and trial divisions earlier. She also serves on our office Ethics Panel.

New Support Staff

Kathryn Bright, joined the office as a Legal Secretary with Group D on April 27. Kathryn comes from WilTel Communications where she served as an executive secretary. She earned her Legal Secretary Certificate from Lamson Junior College.

Marne Drennan, was hired as a temporary Records clerk effective April 13.

Mercy Tellez, rejoined Group A as a Legal Secretary on April 13. Welcome back!

Stephanie Villalobos, Legal Secretary, joined Group A on March 30. She holds a Legal Assistant degree from Apollo College. She was most recently employed as a legal secretary for the Mesa City Attorney's office and previously with the Law Offices of Gonzalez and Smith.

Support Staff Moves/Changes

Gilbert Arevalo, Office Trainee in Group A, left the office effective April 3.

Victoria Hernandez, Legal Secretary, left Group A for a position with the City of Phoenix on April 17. ■

MARICOPA COUNTY STEWARDSHIP STATEMENT

Share information and empower others for the overall good of Maricopa County

Trust and encourage others

Exercise collaborative decision-making

Willing to be a guardian of the public's trust

Act timely to obtain results

Relentless dedication to providing total customer service

Dare to take prudent risks to promote continuous improvement

Set examples of leadership daily

Honor public service with integrity beyond reproach

Inspire yourself and others to achieve the common vision

Praise and recognize others and yourself for positive achievements



AMENDMENTS TO THE RULES OF PROCEDURE FOR SPECIAL ACTIONS

RULE 7. SPECIAL APPELLATE COURT PROVISIONS

(a) - (d) No change

(e) The petition shall consist of a single document. It shall include a jurisdictional statement, a statement of the issues, a statement of the facts material to a consideration of the issues presented, and an argument containing the petitioners' contentions with respect to the issues presented, and the reasons therefore, with citations to the authorities, statutes and appropriate references to the record. A copy of the decision from which the petition is being taken shall be attached to the petition. All references to the record shall be supported by an appendix of documents in the record on appeal that are necessary for a determination of the issues raised by the petition. The response to the petition shall, if necessary, be supported by an appendix of documents in the record on appeal that are necessary for a determination of the issues raised by the petition which are not contained in the petitioner's appendix. If either party's appendix exceeds 15 fifteen pages in length, it shall be fastened together separately from the petition or response. Except by permission of the court, petitions and responses shall not exceed (I) 10,500 words if in proportionate typeface, or (ii) 30 pages if in monospace typeface, exclusive of the appendix and the copy of the decision from which the petition is being taken. The reply, if any, shall not exceed (I) 5,250 words if in proportionate typeface, or (ii) 15 pages if in monospace typeface. The petition, response and any reply must each be accompanied by a certificate of compliance that states the petition's line spacing and states either (I) the petition uses a proportionately spaced typeface, together with the typeface, point size, and word count, or (ii) the petition uses a monospaced typeface, together with the number of characters per inch. A party preparing this certificate may rely on the word count of the processing system used to prepare the petition.

(f) - (h) No change.

March 1998 Jury and Bench Trials

Group A

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
1/26-1/28	Lawson	Galati	Schessnol	CR 97-09739 Burglary/F3; Theft/M1	Not Guilty of Burglary; Guilty of Theft	Jury
3/2-3/3	Rock	Daughton	Patchett	CR 97-05599 Burglary/F4	Not Guilty	Jury
3/9-3/20	Timmer	Baca	Mitchell	CR 96-08825 Sex Abuse of a Child Under 15/F3 Molest of a Child/F2 Sexual Conduct with a Minor/F2	Hung	Jury
3/10-3/10	Leal	Johnson	Strom	TR97-01245CR DUI/M1	Hung 3-3	Jury
3/12-3/12	Green	Schafer	Kramer	CR 97-12674 Criminal Damage/F5	Directed Verdict	Jury
3/16-3/17	Leal	Galati	Sobalvarro	CR 97-11664 Criminal Damage/F6	Not Guilty	Jury
3/19-3/23	Leal	Baca	Freeman	CR 97-11664 Burglary/F4 Criminal Damage/F6	Guilty	Jury
3/19-3/19	Soll	Tolby		CR 97-04026 Interferring with Judicial Procedure/M1	Dismissed at trial	Bench
3/19-3/19	Soll	Tolby		CR 97-03497 Interferring with Judicial Procedure/M1 Assault/M1	Dismissed at trial	Bench
3/20-3/23	Soll	Schwartz	Hernandez	CR 97-08582 Prohibited Possessor Weapons while on probation, 2 priors/F4	Directed Verdict	Jury
3/23-4/9	Tosto	Hyatt	Amato	CR 97-07840 Child Molest/F2 Att. Child Molest/F3 Sex Abuse/F3; All DCAC	Guilty of 3 counts of Child Molest; Not Guilty one count of Att. Child Molest; Guilty of 3 counts of Sex Abuse	Jury
3/23	Bond	Galati	Davis	CR 97-14147 Forgery/F4	Not Guilty	Jury
3/24-3/26	Timmer	Baca	Levine	CR 97-12555 Aggravated Assault Dangerous/F3	Guilty	Jury

(cont. on pg. 16) 

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
3/30-4/2	Green	Galati	Sigmund	CR 97-13037 Aggravated Assault/F3; CR97-11411 Aggravated Assault/F2; Aggravated Assault/F3; Misconduct Involving Weapons/F2	Guilty	Jury
3/30-4/3	Hruby	Hilliard	Freeman	CR 96-13044 Burglary/F2 Aggravated Assault/F3 Theft/F6	Hung; Theft count dismissed	Jury

Group B

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
3/03-3/04	Newhall	Hall	Lawritson	CR 97-05752 Agg. DUI/F4	Guilty	Jury
3/04-3/09	Roth/ Erb	Hotham	Rehm	CR 97-04983 2 Cts. Agg. DUI/F4	Guilty	Jury
3/04-3/09	Navidad/ Erb	Chavez	Boyle	CR 97-03813 2 Cts. Agg. DUI/F4 w/two priors	Hung	Jury
3/04-3/13	Whelihan/ Castro	Rogers	Mroz	CR 97-10178 Child Molest/F2, DCAC Att. Child Molest/F3, DCAC Sexual Abuse/F3, DCAC Att. Sexual Abuse/F4, DCAC 3 Cts. Agg. Assault/F6	Attempted Sexual Abuse - Dismissed Hung on all other counts.	Jury
3/10-3/11	Peterson	Dougherty	Wendell	CR 97-02352 Promoting Prison Contraband/F2 w/two priors	Guilty	Jury
3/17-3/18	Peterson/ Castro	Ellis	Rahi Loo	CR 97-06477 Disorderly Conduct/F6D w/two priors	Guilty - Admitted one prior.	Jury
3/17-3/26	Agan	McDougall	Frick	CR 96-06783 Attempted Murder/F2D	Guilty	Jury

(cont. on pg. 17)

Group C

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
3/2 - 3/4	Moore/ Beatty	Dairman	Harris	CR 97-95209 2 Cts. Agg Aslt/F6	Not Guilty on both counts	Jury
3/3 - 3/6	DuBiel	Aceto	Fuller	CR 97-95031 Theft/F5	Guilty	Jury
3/3 - 3/5	Gaziano	Araneta	Brenneman	CR 97-94499 Forgery/F4	Guilty	Jury
3/6 - 3/6	Antonson	Ore	Berriok	CR 96-15121 2 Cts. Misdemeanor DUI	Guilty	Jury
3/18 - 3/25	Antonson/ Thomas	Keppel	Flader	CR 97-92657 Agg Aslt/F4	Not Guilty	Jury
3/23 - 3/24	Gaziano	Ellis	Vick	CR 97-94570 2 Cts. Agg DUI/F4	Guilty on lesser included misdemeanor DUI	Jury
3/23 - 3/25	Nermyr/ Thomas	Grounds	Vincent	CR 97-95509 Agg Aslt/F3D	Not Guilty	Jury
3/25 - 3/26	Mackey & Murphy	Aceto	Craig	CR 97-93038 2 Cts. Forgery/F4	Not Guilty	Jury
3/26 - 4/2	Shell/ Beatty	Keppel	Fuller	CR 97-91993 Burglary 2/F3	Not Guilty	Jury
3/30 - 4/1	Schmich	Aceto	Craig	CR 97-94169 Att. Burg 2/F4 Poss of Burg Tools/F6	Not Guilty on both counts	Jury
3/30 - 3/31	Barnes	Ellis	Brenneman	CR 97-94356 2 Cts. Forgery/F4	Guilty on both counts.	Jury

Group D

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
2/9-3/2	Beckman & Feldman/ Bradley, Breidenbach & Fairchild	Kamin	Imbordino	CR 96-07192 Murder 1st Degree (Death Penalty Case)	Guilty	Jury
2/26-3/3	Brisson	Gerst	Larsen	CR 97-13096 Agg Robbery/F3	Not Guilty	Jury
3/3-3/5	Jung	Gerst	Cappellini	CR 97-06927 Agg DUI/F4	Not Guilty, Agg. DUI Guilty Lesser Included Driving on Suspended, Misd.	Jury
3/9-3/10	Billar	Katz	Neal	CR 97-09094 1 Ct. Resisting Officer's Arrest/F6	Pled during trial	Jury

(cont. on pg. 18)

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty/guilty	Bench or Jury Trial
3/10-3/11	Huls & Mussman/ O'Farrell	Dunevant	Boyle	CR 97-11083 2 Cts. Agg DUI/F4	Guilty	Jury
3/13-3/17	Kibler	Gerst	Anthony	CR 97-11352 Agg. Asslt./F3	Not Guilt of Agg. Asslt. Guilty of Disorderly Conduct; Motion for New Trial is Under Advisement; New Trial Motion is Pending; Client Remains Out of Custody	Jury
3/25-3/30	Brisson	D'Angelo	Meyer	CR 97-02335 Misconduct Inv. Weapon/ F4	Guilty	Jury

OFFICE OF THE LEGAL DEFENDER

Dates: Start/Finish	Attorney/ Investigator	Judge	Prosecutor	CR# and Charge(s)	Result: w/ hung jury, # of votes for not guilty / guilty	Bench or Jury Trial
3/11-3/13	Tate	Dougherty	Armijo	CR 97-10410 Agg. Asslt./ F6	Hung Jury 4 to 2 Guilty	Jury
3/25-3/27	Parzych	Ellis	Aubuchon	CR 97-95155 Burglary 2°/ F3	Hung Jury 7 to 1 Acquittal	Jury
2/23-3/16	Orent/Aberne thy	Nastro	McCormick	CR 96-00187 Ct.1, Murder1/ F1D Ct.2, Att.Murder 1/ F1D Ct.3, Att.Murder 1/ F1D Ct.4, Threat.orInt.for Gang Purposes/ F4	Guilty Less. Incl. Manslaughter Guilty. Less. Incl.Att.Manslaughter Guilty. Less. Incl.Att.Manslaughter Guilty. Less. Incl. Threat.or Int., Not for Gang Purposes	Jury
3/2-3/6	Miller/Soto	Kamin	Charnell	CR 97-06447 Ct. 1, Murder 1/F1D Ct. 2, Armd. Rob./ F2D	Guilty	Jury
3/4-3/17	Dupont/Pang burn	Cole	Skull	CR 94-09172 (a) Ct. 1, Agg. Asslt./ F2D Ct. 2, Agg. Asslt./ F2D	Guilty	Jury
2/18-2/23	Patton	Wilkinson	Keyt	CR 97-10821 Armed Robbery/ F2	Guilty	Jury
3/16-3/16	Lamb	Schwartz	Freeman	CR 97-11934 1 Ct. Theft/ F3	Not Guilty	Jury
3-16/3-18	Baeurle	Skelly	Hicks	CR 97-10479 Cts.1&2: SOND/ F2 Cts.3,4 &6: Miscond.Inv.Weaps./ F4 Ct.5:PONDS/ F2	Guilty	Jury
3/4-3/9	Ivy	Dunevant	Gadow	CR 97-12175 Theft/ F3	Guilty	Jury

INSIDE ADDITION

The Insider's Monthly

April, 1998

COMMUNITY CORNER

By Lisa Kula
Training Administrator

Since most of you spend the majority of your weekday hours here, you may have developed some affection for the place. No, it's not the freeway, it's the Luhrs building. Known as the oldest office building in Phoenix, it has a rich and interesting history. Jean Crane, granddaughter of George Luhrs, recently shared her family memories of the grand old building with me. Along with its namesake, the building rose to great heights. Built in 1923, it was the tallest building between El Paso, Denver, and Los Angeles. But like most dreams, it began with small steps.

George Henry Nicholas Luhrs immigrated from Germany to the United States in 1869. He spent two years in California before the lure of gold and riches brought him to Arizona. He began his career as a wheelwright in the Vulture Mine. This endeavor led him to form a partnership with a blacksmith, opening their business on the northeast corner of Central and Jefferson. Eventually, this site gave way to the three story Luhrs Hotel. George continued to acquire many parcels of land in the burgeoning city, operating a livery stable in present day Patriots Park.

The first office building he constructed, in 1914, was originally called the Madison building. We now know this structure as Luhrs Central. As George and Martha's family grew, so did their business success. His next project was even more ambitious, a ten story office building. The Luhrs Building was destined to become a special part of the history of Phoenix. It was erected with the most modern of conveniences. Great care and craftsmanship went into the construction. The street level exterior walls were faced with Arizona granite, while the interior walls

were graced with Vermont marble. Unfortunately, cooling systems were not yet available. Air-conditioning was installed in 1932-33. This gave the building the distinction of being the first building in Phoenix with a refrigerated air-conditioning system. When air-conditioning was installed in the Luhrs Hotel in 1936, it was the first hotel in Phoenix with such a convenience, and one of the first in the world. It was also during the 1930's that the murals depicting the Arizona desert were installed in the lobby. They were created by a local artist, who also painted the murals in the state capitol.

The building was home to many business and professional offices. The top four floors were reserved for the Arizona Club. This was a men's club with members representing the civic and business leaders of the day. There were rooms for relaxing and socializing, along with a bath and lounge. The tenth floor was devoted to a large main dining room, bar, and ladies lounge. Although the Arizona Club was exclusively male, ladies were allowed to eat in the dining room after 1:00 pm, by then, the men had finished their lunch and business deals.

The Luhrs Tower was constructed in 1929. Although the same architectural firm, Trost and Trost from El Paso, was employed to design the building, tastes had radically changed. The original plan had been to build a twin for the Luhrs Building, but prevailing styles influenced the Art Deco design. The two buildings were free standing and only became connected when George Luhrs Jr. built the Arcade in 1946. The parking garage followed and completed the building on the block.

George Jr. managed the buildings until 1976, when his declining health forced the family to sell the properties. It was a difficult decision for the family to make, as this part of Phoenix history was so dear a part of their family history. For a peek at the way things were, stop by the 10th floor and check out the photograph taken in 1926 from atop the building.

PERSONNEL PROFILE

Alex Navidad Defender Attorney, Trial Group B

Alex is originally from El Salvador, home to many fine hockey players. He grew up in southern California, and migrated to Arizona in 1992. He became a permanent fixture in the office about 2 years ago, after serving a short gig as a law clerk and a R38 student extern with Dan Lowrance. He is a Cancer, and likes carrots and chocolate.

What is your idea of perfect happiness? Puppies, doves, beautiful flowers, sunsets and a keg of Fat Tire after a hockey game at my night club "Navidog's."

What is your greatest fear? That my credit card company will want me to pay more than the \$35 minimum payment.

Which living person do you most admire? My mother.

Which living person do you most despise? The guy who invented ties and collars.

Who are your heroes in real life? My mother, Billy Mills and Ben Franklin.

Who is your favorite hero of fiction? The mouse from Mouse Trap and Spicoli.

What is the trait you most deplore in yourself? My slapshot.

What is the trait you most deplore in others? Their slapshot.

What is your greatest extravagance? Going to both the County and State fair each year.

On what occasion do you lie? I never tell the state border guy that I have fruits and vegetables in the car, I never admit that I am actually wearing Bugle Boys and I always tell solicitors that I am the women of the house.

If you could change one thing about yourself, what would it be? I would be really tall, like 5'8".

What do you consider your greatest achievement? After being rejected, responding, "You've misunderstood, I didn't say 'would you like to dance,' I said 'you look fat in those pants.'"

What is the quality you most like in a man? They usually do not use e-mail very much.

What is the quality you most like in a woman? Sense of humor (and no goatee.)

What do you most value in your friends? They go to the fair with me.

If you were to die and come back as a person or thing, what do you think it would be? Corn on the cob from the fair.

If you could choose what to come back as, what would it be? Xena, warrior princess.

What is your motto? Lead, follow, or get out of the way - or, stop the senseless e-mail.

THE LIGHTER SIDE

Attitude

Once upon a time, two frogs fell into a bucket of cream.

The first frog, seeing that there was no way to get any footing in the white liquid, accepted his fate and drowned.

The second frog didn't like that approach. He started thrashing around in the cream and doing whatever he could to stay afloat. After a while, all of his churning turned the cream into butter, and he was able to hop out.

Moral: The worlds of thought and action overlap. What you *think* has a way of becoming true.

April IT Puzzle ..Word Search.....*Hopping down the bunny trail.....*

J	E	A	S	H	W	E	D	N	E	S	D	A	Y	T	S	G	H
I	L	T	R	E	A	S	T	E	R	E	G	G	H	U	N	T	T
A	I	E	Y	A	D	N	U	S	M	L	A	P	R	C	E	A	N
P	A	N	A	S	E	S	Y	B	E	H	O	U	G	R	X	E	E
R	T	N	D	T	M	A	V	A	S	F	A	S	A	M	M	P	E
I	N	O	N	E	A	Z	S	L	D	T	Y	Z	A	I	H	A	T
L	O	B	U	R	R	B	F	T	X	I	A	N	T	O	E	S	F
S	T	R	S	B	D	E	A	E	E	N	R	G	S	A	R	S	I
H	T	E	R	U	I	X	L	S	F	R	N	F	R	Y	M	O	F
O	O	T	E	N	G	O	C	O	K	I	P	I	D	R	I	V	L
W	C	S	T	N	R	D	S	T	R	E	E	A	G	O	X	E	I
E	R	A	S	Y	A	U	E	P	L	S	T	Z	R	G	O	R	R
R	E	E	A	K	S	S	S	L	L	A	B	E	S	A	B	G	P
S	T	Z	E	E	B	I	R	T	H	O	F	B	U	D	D	H	A
R	E	C	J	Y	A	D	S	E	I	R	A	T	E	R	C	E	S
D	P	D	A	Y	L	I	G	H	T	S	A	V	I	N	G	S	I
N	S	T	E	K	M	E	L	A	S	U	R	E	J	G	N	O	H
I	N	T	E	R	A	L	R	E	V	E	N	U	E	B	R	A	W

Search List

April Fifteenth	Daylight Savings	Good Friday	Passover
April Showers	Easter Bonnet	Internal Revenue	Peter Cottontail
Aries	Easter Bunny	Jerusalem	Secretaries Day
Ash Wednesday	Easter Egg Hunt	Jesus of Nazareth	Seder
Baseball	Easter Parade	Mardi Gras	Springtime
Basket	Easter Sunday	Matzah	Taurus
Birth of Buddha	Exodus	Palm Sunday	Taxman



Plan to attend:

CULTURAL DIVERSITY AND THE



LEGAL SYSTEM

A MCPD Training Seminar

Friday May 8, 1998

Training Facility

Arcade #10

9:00 -11:00

To register, contact Lisa Kula

